Supreme Court, U. S.
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In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1068

ARNOLD C. COMINS,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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In the
Supreme Court of the United States.

OCTOBER TERM, 1976.

No. .

ARNOLD C. COMINS,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

The petitioner, Arnold C. Comins, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of Massachusetts entered on October 18, 1976, upon which rehearing was denied November 5, 1976.

Opinion Below.

The opinion of the Supreme Judicial Court is reported in 1976 Mass. Adv. Sh. 2448, 356 N.E. 2d 241, and is set forth in the Appendix hereto (pages 3a-16a).

Jurisdiction.

The judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts was entered on October 18, 1976 (App. 1a), and rehearing was denied November 5, 1976 (App. 2a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

Questions Presented.

1. Whether indictments based upon hearsay testimony of an inflammatory and prejudicial nature are violative of due process.
2. Whether the petitioner was denied due process in that he did not receive fair notice of the offenses with which he was charged.

Constitutional and Statutory Provisions.

Section 1 of the Fourteenth Amendment to the Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 32 (paragraph one) of chapter 94C of the General Laws of Massachusetts:

> "Except as authorized by this chapter, no person shall knowingly or intentionally manufacture, distribute, dispense, or possess with intent to manufacture, distribute or dispense a controlled substance; or create, distribute, dispense, or possess with intent to distribute or dispense a counterfeit substance."

Statement of the Case.

The petitioner, an osteopathic physician, was indicted in April, 1973, by a grand jury of the County of Barnstable, Massachusetts. There were two indictments returned at that time, both charging the petitioner with dispensing controlled substances "in bad faith and in excessive amounts" during March and April of 1973 (App. 16a-17a). One of the indictments charged a violation of Massachusetts General Laws, c. 94C, § 32; the other used virtually identical language, but failed to cite a statutory section. On April 17, 1974, these two indictments were nol prossed. Two weeks earlier, on April 4, 1974, seven indictments were returned charging that in March and April of 1973 the petitioner "unlawfully dispensed" named controlled substances "not for a legitimate purpose" in viola-

tion of c. 94C, § 32 (App. 18a-22a). These indictments were directed against the same conduct of the petitioner as were the earlier indictments.

The petitioner moved to dismiss the indictments on the grounds, *inter alia*, that the grand jury testimony upon which the indictments were based was improper and prejudicial, and that the statute was unconstitutionally vague (App. 22a-24a). Those motions were denied.

The Commonwealth grounded its case upon the testimony of two undercover police officers who had gone to the office of the petitioner on various occasions and received prescriptions for controlled substances. The grand jury had heard only the hearsay testimony of a third police officer which consisted of his reading the reports of the two officers directly involved and offering his own observations and conclusions. His testimony was inflammatory and prejudicial in that it included references to comments allegedly made by the petitioner concerning sex (App. 25a-27a). These comments had no bearing upon the offenses with which Dr. Comins was later charged.

At trial the undercover agents testified that they had told the petitioner that they were addicts in need of help (Tr. I-31, II-98). The Commonwealth's experts testified that the drugs prescribed were appropriate to the complaints which had been made to Dr. Comins (Tr. III-47, III-11-12); that all of the drugs have accepted uses in the treatment of drug-dependent persons (Tr. III-58-63); and that the amounts prescribed by the petitioner were not necessarily excessive (Tr. III-43-44). This was especially true in light of the reasons advanced by the undercover agents for receiving additional prescriptions: that a prescription had been lost by one agent (Tr. IV-25); and that a roommate had taken the prescription of the other agent (Tr. IV-29-30). There was expert testimony that the petitioner's failure to do a medical history and physical examination was poor medical practice (Tr. III-10, III-25, III-59, III-64).

The petitioner was a practitioner and physician duly registered in accordance with state law and authorized to prescribe controlled substances. Further, he was duly registered under federal law and authorized to dispense and prescribe controlled substances; he had been issued BNDD number AC-1947817 (Tr. I-10, Ex. 1).

The trial was conducted without jury and the petitioner was found guilty on all counts. The Massachusetts Supreme Judicial Court affirmed the convictions (App. 1a) and denied rehearing (App. 2a).

Reasons for Granting the Writ.

I. The Decision Below Raises a Constitutional Question which has Not Yet been Addressed by the Court.

The Supreme Judicial Court of Massachusetts dismissed the attack upon the grand jury proceedings by citing this Court's opinion in *Costello* v. *United States*, 350 U.S. 359 (1956). The holding in that case was that a grand jury may indict on hearsay testimony alone and nonetheless satisfy the requirements of the Fifth Amendment. It is not the hearsay character of the grand jury testimony which the petitioner asserts has violated his Fourteenth Amendment right to due process. Rather, it is the fact that the testifying officer introduced much inflammatory and prejudicial information which had the intended result of biasing the grand jurors and denying him the due process to which he is entitled.

Pages 11 through 15 of the grand jury transcript are particularly striking in this regard (App. 25a-27a). The grand jurors are told nothing in this section of the testimony which is even remotely material to the allegations of criminal conduct. They are, however, titillated with the petitioner's unconven-

tional openness about sex. No purpose can be gleaned from the officer's remarks other than to prejudice the jurors against the petitioner.

Indeed, the responses of some of the grand jurors to this line of testimony make this plain:

> "It sure doesn't represent a common Doctor.
> "Right, I think we have the idea" (App. 27a).

The testifying officer again injected his biased view of the petitioner by casting doubt on his qualifications. The witness implied that Dr. Comins was somehow less than a "regular Medical Doctor" (Gr. J. at 6). The prosecutor buttressed this suggestion by his exchange with a juror with regard to the "Medical Association" (Gr. J. at 17).

Finally, the grand jury minutes contain numerous conclusory statements of the witness which demonstrate his prejudice and to which he was not competent to testify. For example, he described the April 3 transaction as the "same garbage" (Gr. J. at 16). On another occasion he characterized the events as "[o]verprescribing, the same type of stuff" (Gr. J. at 16).

Mr. Justice Burton, concurring in *Costello*, *supra*, was careful to state what he assumed to be the limits of the broad language of the majority opinion:

> "[T]his Court would not preclude an examination of grand-jury action to ascertain the existence of bias or prejudice in an indictment. Likewise, it seems to me that if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, that indictment should be quashed. To hold a person to answer to such an empty indictment

> for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen." 350 U.S. at 364.

Other decisions of this Court similarly suggest that grand jury proceedings must be impartial and unbiased. Cf. *Lawn* v. *United States*, 355 U.S. 339 (1958); *Hale* v. *Henkel*, 201 U.S. 43 (1906). See also *Martin* v. *Beto*, 397 F. 2d 741 (5th Cir. 1968) (Thornberry, J., concurring). The courts recognize that there are constitutional limits upon grand jury proceedings, but nowhere have these limitations been articulated. See, *e.g.*, *Commonwealth* v. *Comins*, ____ Mass. ____, 356 N.E. 2d 241, 243 (1976) (App. 3a, 4a); *United States* v. *Sweig*, 316 F. Supp. 1148, 1153 (S.D. N.Y. 1970), *aff'd*, 441 F. 2d 114 (2d Cir. 1971), *cert. denied*, 403 U.S. 932 (1971).

In *Beck* v. *Washington*, 369 U.S. 541 (1962), the question of grand jury bias was raised, but the Court found it unnecessary to reach that question and specifically refrained from examining the issue:

> ". . . even if due process would require a State to furnish an unbiased body once it resorted to a grand jury procedure — a question upon which we do not remotely intimate any view — we have concluded that Washington, so far as is shown by the record, did so in this case." *Id.* at 546.

Many of the grand jury bias cases, see, *e.g.*, *Beck* v. *Washington*, *supra*; *Martin* v. *Beto*, *supra*; *United States* v. *Sweig*, *supra*, have arisen as a result of the notoriety of a particular defendant. In such circumstances the prosecution may or may not have participated in creating the atmosphere of notoriety.

In the case of petitioner Comins the issue of grand jury bias is raised in the starkest of terms. There are no influences beyond the grand jury room which the petitioner claims to have tainted the proceeding. It is simply the conduct of the prosecutor which has denied the petitioner due process. This Court has not previously examined the limits of permissible prosecutorial conduct in the grand jury room. The record in this case squarely presents such an issue. It is submitted that certiorari should be granted to review this question.

II. The Decision Below Raises a Question of the Permissible Constitutional Limits of State Statutory Construction Mandating Review by this Court.

From the outset it was never clear how the conduct of the petitioner could be construed as proscribed by c. 94C, § 32, of the Massachusetts General Laws. That section provides in relevant part:

> "Except as authorized by this chapter, no person shall knowingly or intentionally manufacture, distribute, dispense, or possess with intent to manufacture, distribute or dispense a controlled substance. . . . "

The indictments charged that the petitioner " . . . did unlawfully dispense . . . not for a legitimate medical purpose, in violation of the provisions of Massachusetts General Laws Chapter 94C, Section 32" (App. 18a-22a). As the court below noted, there is a statutory exception for physicians (App. 12a-13a). The language of § 32 nowhere mentions "legitimate medical purpose." (This language does appear in § 19 of c. 94C, but the petitioner was never charged under this section.)

The Supreme Judicial Court of Massachusetts took the language of § 32 and fashioned a standard of conduct for physicians — a standard which that court found the petitioner had violated. The petitioner could not have known that his conduct would be proscribed by this statute prior to the Supreme Judicial Court's tortured construction of § 32, and, therefore, he has been denied due process by this failure of notice.

The evidence upon which the court below relied is set forth in its opinion (App. 8a-11a). Both agents had told petitioner that they were addicts seeking help in ending their addiction. He took no medical histories, nor did he examine them. He issued prescriptions for controlled substances and charged a fee of $10 per office visit. There was expert testimony that the failure to take the histories and give physical examinations was not proper medical practice. There was further uncontroverted expert testimony that the drugs prescribed were appropriate for the treatment of drug addicts (Tr. III-58-63). One of the experts testified that the amounts prescribed were not necessarily excessive (Tr. III-43-44). It was stipulated at trial that the petitioner was properly licensed and registered by both state and federal authorities, and that he was authorized to dispense and prescribe controlled substances by both sovereigns (Tr. I-10, Ex. 1).

After reviewing the evidence in the case, the court below upheld the convictions under § 32 based upon the following standard for judging the conduct of a physician:

> "A physician who issues a prescription not intending to treat a patient's condition in the usual course of his practice of medicine does not issue a valid prescription, and he thus violates § 32. Such a physician violates § 32 because he acts in bad faith, in the sense that his purpose is not to treat the patient in accord with accepted medical practice. Although the physician's failure to comply with

accepted medical practice is an element of the crime and evidence is admissible that the physician failed to adhere to accepted medical practice, mere malpractice in the prescribing of drugs has not been made a crime. To prove the crime, the physician's purpose, his state of mind, must be shown to have been such that he was not intending to achieve a legitimate medical objective." (App. 13a.)

From this formulation it is far from clear where the line is to be drawn between "mere malpractice" and criminal conduct. But even if it is assumed that such a standard is within the limits of statutory construction, the petitioner had no fair notice prior to the Supreme Judicial Court's opinion that such a standard would be applied to him.

This confusion as to what conduct of a physician was proscribed by § 32 had been a problem for the Commonwealth itself throughout the case. The earlier indictments (which were directed at the same conduct of the petitioner) had charged dispensing controlled substances " . . . in bad faith and in excessive amounts . . . " (App. 16a-17a). These indictments were nol prossed after the seven indictments in this case were returned. As noted, these indictments spoke in terms of "legitimate medical purpose." The instant case was the first time § 32 had been construed by the Supreme Judicial Court as applied to physicians. The petitioner could not have anticipated that his conduct would be proscribed by the bare-bones language of that section of the statute.

The federal standard certainly would not have put him on notice:

"A physician is restricted to dispensing or prescribing drugs in the bona fide treatment of a patient's disease,

including a dispensing of a moderate amount of drugs to a known addict in a good-faith attempt to treat the addiction or to relieve conditions or suffering incident to addiction." *United States* v. *Collier*, 478 F. 2d 268, 272 (5th Cir. 1973).

The petitioner finds himself in much the same position as the petitioners in *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), where this Court reaffirmed " . . . [t]he basic principle that a criminal statute must give fair warning of the conduct that it makes a crime. . . . " *Id.* at 350. Nothing in the language of the statute under which Dr. Comins was charged can be read as providing such warning. Nor, given the state of the law in other jurisdictions and in the federal courts, could the petitioner have reasonably expected that the court below would be able to give the statute such a tortured construction as to find him criminally liable thereunder.

For example, the reported federal cases involving physicians rely upon such factors as: numerous post-dated prescriptions, *United States* v. *Bartee*, 479 F. 2d 484 (10th Cir. 1973); grossly excessive amounts, *United States* v. *Larson*, 507 F. 2d 385 (9th Cir. 1974); or charging by the prescription or quantity prescribed, *United States* v. *Larson*, *supra*. None of these factors was present in the instant case.

The petitioner's attack at this point is not upon the face of the statute, see *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939), but upon the construction which the Supreme Judicial Court gave the statute as applied to him. *Bouie* v. *City of Columbia*, *supra*; *Palmer* v. *City of Euclid*, 402 U.S. 544 (1971); *Douglas* v. *Buder*, 412 U.S. 430 (1973). This kind of due process violation can be even more invidious than that condemned in *Lanzetta*, *supra*. As the *Bouie* Court pointed out:

> "If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes,' as in *Lanzetta*, or to 'guess at [the statute's] meaning and differ as to its application,' as in *Connally*, the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question." *Id.* at 352.

The petitioner's position from the beginning of the case has been that he could not be found guilty under § 32 because he had done nothing which the statute proscribed. The construction of the statute as applied to physicians which the court below created from whole cloth has erected a new standard — one which a person of ordinary intelligence could not have anticipated would be imposed.

Conclusion.

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Massachusetts Supreme Judicial Court.

Respectfully submitted,

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Appendix.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,
AT BOSTON, October 18, 1976.

In the case of SJC #526

COMMONWEALTH
vs.
ARNOLD C. COMINS

pending in the Superior Court for the County of Barnstable #34243

Ordered, that the following entry be made in the docket viz., —

Judgments affirmed.

By the Court,
WILLIAM M. CLORAN, ASST. CLERK.

October 15, 1976.

Brief statement of the grounds and reasons of the decision:

See opinion on file.

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

COURT HOUSE
BOSTON

FREDERICK J. QUINLAN
CLERK
WILLIAM M. CLORAN
ASSISTANT CLERK

November 5, 1976

Robert W. Harrington, Esq.
Attorney Judith E. Diamond
75 Federal Street
Boston, Massachusetts 02110

Dear Attorneys:

Re: Commonwealth v. Arnold C. Comins
Supreme Judicial Court No. SJC-526
1976 A. S. 2448

Your request for a rehearing in re the above captioned case has been considered by the court and is denied.

Very truly yours,
FREDERICK J. QUINLAN, CLERK

c.c.: W. James O'Neill, Asst. Dist. Atty.
Barnstable Superior Court House
District Attorney's Office
Barnstable, Massachusetts 02630

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

COMMONWEALTH *vs.* ARNOLD C. COMINS

Barnstable. May 4, 1976. — October 18, 1976.

Present: Hennessey, C.J., Braucher, Kaplan, & Wilkins, JJ.

Narcotic Drugs. Physician. Practice, Criminal, Indictment. *Evidence,* Relevancy and materiality; Opinion: expert; Hearsay. *Words,* "Dispense," "Ultimate user."

Indictments found and returned in the Superior Court on April 4, 1974. The cases were heard by *Zarrow,* J. The Supreme Judicial Court granted a request for direct appellate review.

Robert W. Harrington (*Judith E. Diamond* with him) for the defendant.

W. James O'Neill, Assistant District Attorney (*Gary A. Nickerson,* Assistant District Attorney, with him) for the Commonwealth.

WILKINS, J. The defendant, a licensed osteopathic physician, appeals from seven convictions for dispensing controlled substances in violation of G.L. c. 94C, § 32.[1] He challenges (1) the denial of his motions to dismiss each indictment, (2) the denial of his motions for judgments of acquittal, and (3) certain evidentiary rulings made during the course of his

[1] The first paragraph of G.L. c. 94C, § 32, inserted by St. 1971, c. 1071, § 1, provides in part: "Except as authorized by this chapter, no person shall knowingly or intentionally manufacture, distribute, dispense or possess with intent to manufacture, distribute or dispense a controlled substance. . . ."

jury waived trial. This case is concerned principally with the proper form of an indictment which charges a prescribing physician with violation of the controlled substances act (G.L. c. 94C) and with the proof necessary to sustain a conviction of a physician for the unlawful prescribing of a controlled substance. We granted the defendant's application for direct appellate review. We affirm the convictions.

1. The defendant moved to dismiss the indictments, relying on several grounds.[1] Of those grounds which the defendant still pursues, some may be disposed of briefly.

The fact that the indictments were issued solely on the basis of hearsay evidence is not in itself a ground for their dismissal. *Commonwealth* v. *Gibson*, Mass. , - (1975).[a] *Commonwealth* v. *Lammi*, 310 Mass. 159, 163-164 (1941). *Costello* v. *United States*, 350 U.S. 359 (1956). See *Commonwealth* v. *Lincoln*, Mass. , n. 2 (1975),[b] for a discussion of a preferred procedure. These authorities indicate that, in the absence of extraordinary circumstances, an indictment based exclusively on hearsay will not be overturned. There are no extraordinary circumstances shown in the grand jury proceedings.

The indictments did not have to allege in the words of § 32 that the defendant "knowingly or intentionally" dispensed a controlled substance unlawfully. Although a knowing or intentional delivery is clearly an element of the crimes charged, as § 32 states, the form of these indictments was

[1] Each indictment followed the same form, charging that the defendant on a certain day in March or April, 1973, at Orleans, "did unlawfully dispense a controlled substance, Class B, to wit: [naming the drug], not for a legitimate medical purpose, in violation of [G.L. c. 94C, § 32]."

[a] Mass. Adv. Sh. (1975) 2652, 2659-2663.

[b] Mass. Adv. Sh. (1975) 2215, 2222 n. 2.

proper by reason of G.L. c. 277, § 38, as appearing in St. 1971, c. 1071, § 8, which states that "[i]n a prosecution under any provision of [G.L. c. 94C], for unlawfully . . . dispensing . . . a controlled substance . . . it shall be sufficient to allege that the defendant did unlawfully . . . dispense . . . such alleged substance, without any further allegations . . . but the defendant shall be entitled to a bill of particulars under [§ 40]." This language, adopted as part of the same act which inserted G.L. c. 94C, answers any claim that the indictment had to allege that the defendant acted "knowingly or intentionally." See *Commonwealth* v. *Baker*, Mass. , - , (1975);[c] *Commonwealth* v. *McClaine*, Mass. , - (1975),[d] and cases cited. Here, there is no question that the defendant had sufficient notice of the nature of the charges against him. The indictments stated that his conduct was "not for a legitimate medical purpose, in violation of [G.L. c. 94C, § 32]," and the defendant's motions for particulars were allowed and bills of particulars were filed to which the defendant has raised no objection.

We come then to the defendant's major challenge to the indictments. He contends that a registered physician cannot be guilty of "dispensing" a controlled substance in violation of G.L. c. 94C, § 32. He argues that a licensed physician cannot "dispense" a controlled substance in violation of G.L. c. 94C because only when the delivery of a controlled substance is a lawful delivery can one "dispense" that substance as the word "dispense" is defined in G.L. c. 94C, § 1, as amended by St. 1972, c. 806, § 3. Consequently, so the argument goes, no unlawful "dispensing" by a physician may occur under G.L. c. 94C. The inference is that a physician may be charged under G.L. c. 94C, § 32, with unlawful

[c] Mass. Adv. Sh. (1975) 1875, 1899-1900, 1902.

[d] Mass. Adv. Sh. (1975) 1266, 1267-1268.

"distributing" of a controlled substance but not with "dispensing."[3]

The premise of the defendant's argument fails on a literal reading of the definition of "dispense." If "dispensing" only can be a lawful act under G.L. c. 94C, it is difficult to explain why the word appears in § 32 to describe unlawful conduct.

A physician who unlawfully issues a prescription for a controlled substance may "dispense" a controlled substance. "Dispense" means "to deliver a controlled substance to an ultimate user or research subject . . . by a practitioner . . . including the prescribing and administering of a controlled substance. . . ." G.L. c. 94C, § 1, as amended by St. 1972, c. 806, § 3. There is nothing in this definition which indicates that the controlled substance or the prescription must be delivered lawfully. The definition of "practitioner" includes a physician even when he is acting outside of his lawfully authorized role. G.L. c. 94C, § 1, inserted by St. 1971, c. 1071, § 1.[4]

The question whether a licensed physician who has delivered a controlled substance unlawfully under the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801 et seq. (1970), should be charged with "dispensing" or with "distributing" that substance has attracted divergent views in the United States Courts of Appeals.[5]

[3] "Distribute" is defined in G.L. c. 94C, § 1, as "to deliver other than by administering or dispensing a controlled substance."

[4] The defendant, even if acting unlawfully, was nevertheless still "[a] physician . . . registered to distribute [or] dispense . . . a controlled substance in the course of professional practice . . . in the Commonwealth."

[5] An initial disagreement among the circuits as to whether a physician may be charged under 21 U.S.C. § 841(a)(1) (1970) with unlawful delivery of a controlled substance was resolved in the affirmative in *United States* v. *Moore*, 423 U.S. 122 (1975). However, because the defendant in the *Moore* case was charged both with "distributing" and "dispensing" (id. at 124), and no question was raised concerning this aspect of the indictment, the *Moore* opinion does not resolve the split among the circuits concerning the proper verb ("dispense" or "distribute") to describe a physician's unlawful prescribing under 21 U.S.C. § 841(a)(1) (1970). The Uniform Controlled Substance Act avoids the problem by referring to "deliver[y]" of a controlled substance (see § 401[a]), a word which the Commissioners' Note to § 401 indicates was selected to include both dispensing and distributing, as defined in the uniform act. Uniform Controlled Substances Act § 401, Note.

Some courts have indicated that a physician is "dispensing" when he prescribes a controlled substance outside of the lawful scope of his practice. See *United States* v. *Hicks*, 529 F. 2d 841, 844 (5th Cir. 1976); *United States* v. *Green*, 511 F. 2d 1062, 1072 (7th Cir. 1975), cert. denied, 423 U.S. 1031 (1976); *United States* v. *Leigh*, 487 F. 2d 206, 207-208 (5th Cir. 1973); *United States* v. *Bartee*, 479 F. 2d 484, 486-488 (10th Cir. 1973). Other courts have indicated that a physician does not "dispense" a controlled substance in such a circumstance; he "distributes" it. See *United States* v. *Ellzey*, 527 F. 2d 1306, 1308 (6th Cir. 1976); *United States* v. *Rosenberg*, 515 F. 2d 190, 200 (9th Cir. 1975), cert. denied, 423 U.S. 1031 (1976); *United States* v. *Black*, 512 F. 2d 864, 866 (9th Cir. 1975); *United States* v. *Badia*, 490 F. 2d 296, 298 (1st Cir. 1973).[6]

We do not face, and need not decide, the issue which has divided the Courts of Appeals. A 1972 amendment of the definition of "dispense" in G.L. c. 94C, § 1, has undercut the reasoning lying behind those Federal opinions which have held that a physician "distributes" but does not "dispense" a controlled substance when he exceeds his professional authorization. Prior to its amendment in 1972, G.L. c. 94C, § 1, defined "dispense" in much the same language as "dispense" is defined in the Federal law. Compare G.L. c. 94C, § 1,

[6] Much can be said for the approach of the uniform act which replaces "distribute" and "dispense" with the single verb "deliver." In these circumstances, the choice of words should not be permitted to become crucial, and judicial time can be better spent trying to resolve more important questions.

inserted by St. 1971, c. 1071, § 1, with 21 U.S.C. § 802 (1970). In the original Massachusetts law, and still under the Federal law, the definition of "dispense" includes the delivery of a controlled substance "pursuant to the *lawful* order of a practitioner" (emphasis supplied). See St. 1971, c. 1071, § 1. The 1972 amendment of the Massachusetts definition eliminated the word "lawful" so that delivery of a controlled substance pursuant to an unlawful order of a physician could constitute "dispensing." St. 1972, c. 806, § 3. The absence of the word "lawful" in the Massachusetts definition of dispense makes the reasoning of the First Circuit Court of Appeals in the *Badia* case seem inapplicable under the present Massachusetts law.[7] The elimination of the word "lawful" with respect to a physician's order when another person acts pursuant to that order gives substantial support to our view that a literal reading of the definition of "dispense" is the correct one: that a physician, "dispenses" whether lawfully or unlawfully.[8]

2. We turn next to the defendant's argument that the evidence did not warrant a conviction under any of the indictments and that, consequently, each motion for judgment of acquittal should have been allowed.

The judge would have been warranted in finding that, on March 27, 1973, one Garrison, a State police officer assigned

[7] All the other opinions of Courts of Appeals cited above (except perhaps the *Black* case, *supra* at 866) which reach the *Badia* result contain no significant analysis of the question and rely on the *Badia* opinion.

[8] A contrary view would mean that an unlawful prescription would require a charge of "dispensing" for one purpose (in a charge against one who distributes a controlled substance pursuant to the prescription) and not for another (in a charge against that physician for acting outside his professional authorization in issuing the prescription). Such legal technicalities should be avoided where possible, and the Legislature has done so in its treatment of the definition of "dispense."

to the Criminal Information Bureau, Narcotics Unit, went to the defendant's office, which was located on the ground floor of his home in Orleans. The defendant was conversing with several adolescents in the reception area. Posing as a patient, Garrison stated that he wished to discuss a personal matter with the defendant. They went into an adjoining consultation room where Garrison told the defendant that he had a drug problem of which he wanted to be free. The defendant asked Garrison whether he used "scag," a street name for heroin, and Garrison replied that he "shot up a couple of bags every two or three days." The defendant then noted that Garrison had taken an important step and asked what he wanted. Garrison replied that he wanted something to help him over the "hard times." The defendant then asked which drug he wanted. Garrison made a request for numorphan, which the defendant refused "because a pharmacist would report a prescription for that to the police. . . ." Garrison rejected the defendant's offer of robitussin and countered with a request for percodan, to which the defendant acceded. They then returned to the reception area where the defendant wrote out a prescription for percodan and another prescription not the subject of an indictment here. When he gave the prescriptions to Garrison, the defendant stated, "I have to write the Percodan 4 to 6 hours per day for pain, but you know how to use it," and suggested that he fill the prescriptions in Hyannis instead of Provincetown. No medical history was taken by the defendant, and he made no physical examination of Garrison. Garrison did not see the usual items associated with a medical practice when he was in the defendant's office.

On March 30, 1973, a female police officer, Phinney, also posing as a patient, went to the defendant's office and found the defendant engaged in a nonmedical discussion with three adolescents, which lasted over an hour. During this time, Garrison returned to the defendant's office, and the defendant

issued another prescription for percodan to him. Garrison had spoken with the defendant by telephone earlier that day, and the defendant had agreed to have Garrison return for a second prescription. In the course of sitting in the defendant's office, Phinney observed the doctor issuing a prescription for a controlled substance to each of the two adolescent girls who were present. One girl was able to get a prescription for percodan when she said she was on "junk." Phinney then stated that she was on "junk," and the defendant wrote a prescription for percodan for her. He asked her to fill the prescription in Boston. At no time on March 30 did the defendant either take a medical history or conduct a physical examination of either Garrison or Phinney.

On April 3, 1973, Garrison went to the defendant's office again. Phinney arrived shortly thereafter. Phinney requested another prescription of percodan, telling the defendant that the prescription he had given her on March thirtieth had been used up. When the defendant asked her if she wanted anything else, she said she wanted some "T-20's," a reference to biphetamine T-20, a substance which at the time should not have been made available by a pharmacist. A short conversation ensued between Garrison, Phinney, and the defendant as to whether T-20's were "good to get off on," after which the defendant issued Phinney a prescription for percodan and one for biphetamine T-20. When Phinney left, Garrison asked the defendant for another prescription for percodan and for something to help him sleep, and the defendant gave him another prescription for percodan and a prescription for tuinal. The defendant requested that he fill these prescriptions off the Cape. At no time on April 3 did the defendant take a medical history or physically examine either police officer.

At each office visit, each officer paid the defendant $10. The prescriptions were never filled. Percodan, biphetamine

T-20, and tuinal are all controlled substances under G.L. c. 94C. There was expert medical testimony that proper medical practice required a medical history and physical examination before prescribing these drugs for any medical purpose.

We reject as without merit the defendant's argument that the Commonwealth's proof was insufficient because the various prescriptions were not filled. The definition of "dispense" appearing in G.L. c. 94C, § 1, includes "prescribing" within the act of dispensing. The words "including the prescribing and administering of a controlled substance" appearing in the definition of "dispense" mean that either "prescribing" or "administering" are intended to be acts of dispensing. See *United States* v. *Leigh*, 487 F. 2d 206, 208 (5th Cir. 1973). A disjunctive reading of the word "and" is called for in the context. See *United States* v. *Bartee*, 479 F. 2d 484, 487 (10th Cir. 1973), where a similar conclusion was reached as to parallel language in 21 U.S.C. § 802(10) (1970).

The defendant continues, arguing that the delivery must be to "an ultimate user or research subject" (G.L. c. 94C, § 1) in order to constitute a dispensing of a controlled substance and contends that the police officers were neither. An "ultimate user" is defined in G.L. c. 94C, § 1, inserted by St. 1971, c. 1071, § 1, as "a person who lawfully possesses a controlled substance for his own use. . . ." The defendant argues that the undercover police officers did not "possess" a controlled substance "lawfully" and "for [their] own use." As we have already indicated, the prescribing itself constitutes a delivery of a controlled substance within the definition of the word "dispense." There is thus "possession" of a controlled substance without the necessity of going through the needless expense of filling the prescription. Cf. *United States* v. *Green*, 511 F. 2d 1062, 1072 (7th Cir. 1975), cert. denied, 423 U.S. 1031 (1976). We think also that the possession was

"lawful." Police officers acting undercover received the prescriptions in pursuit of their work, and, therefore, their possession was lawful, even if the physician was not acting lawfully in delivering those prescriptions. By the same token, the prescriptions were received for the police officers' own use, in the sense that they received them while acting in the role of a consumer, the purpose of the words "for his own use" in the definition of an "ultimate user" in G.L. c. 94C, § 1.

If undercover police operations such as were conducted here could not lead to convictions under G.L. c. 94C because the police officers were not "ultimate user[s]," the investigation and prosecution of drug violators would be limited severely and unnecessarily. We do not attribute to the Legislature an intention to prohibit undercover police operations of the type involved in this case. The defendant's argument in effect requires us to do so, and we reject it. See *Commonwealth* v. *Miller*, 361 Mass. 644, 655 (1972); *United States* v. *Bartee*, *supra* at 487, where a contention that the drug must be used was rejected under the parallel definition of an "ultimate user" in the Federal act.

We come then to the defendant's argument that the evidence of the circumstances in which the defendant delivered the prescriptions was insufficient to warrant a conviction of a physician for unlawful dispensing of a controlled substance. This argument requires us to analyze the standard to which a physician is held under G.L. c. 94C when he dispenses a controlled substance.

Section 32 of G.L. c. 94C provides in part that "[e]xcept as authorized by this chapter, no person shall knowingly or intentionally . . . dispense . . . a controlled substance. . . ." Clearly a statutory exception is necessary for persons who practice medicine, and for other professionals who make legitimate uses of drugs. For that reason, G.L. c. 94C, § 19(a), inserted by St. 1971, c. 1071, § 1, stated (in part) that

"[a] prescription for a controlled substance to be valid shall be issued for a legitimate medical purpose by a practitioner acting in the usual course of his professional practice."

A physician who issues a prescription not intending to treat a patient's condition in the usual course of his practice of medicine does not issue a valid prescription, and he thus violates § 32. Such a physician violates § 32 because he acts in bad faith, in the sense that his purpose is not to treat the patient in accord with accepted medical practice. Although the physician's failure to comply with accepted medical practice is an element of the crime and evidence is admissible that the physician failed to adhere to accepted medical practice, mere malpractice in the prescribing of drugs has not been made a crime. To prove the crime, the physician's purpose, his state of mind, must be shown to have been such that he was not intending to achieve a legitimate medical objective. *United States* v. *Rosenberg*, 515 F. 2d 190, 193, 194-195 (9th Cir. 1975), cert. denied, 423 U.S. 1031 (1976). *United States* v. *Collier*, 478 F. 2d 268, 272 (5th Cir. 1973). Cf. *United States* v. *Moore*, 423 U.S. 122, 138-139, 142-143 (1975).

We have no question that the evidence summarized above warranted a finding that the defendant acted in bad faith in delivering the prescriptions which are the subject of the indictments in this case. Also, there was evidence that the defendant's conduct was not in accord with accepted medical practice. He took no medical histories and conducted no physical examinations. These facts support an inference that the defendant did not have medical needs in mind when he issued the prescriptions and that he was not interested in finding physical indications of such needs. *United States* v. *Ellzey*, 527 F. 2d 1306 (6th Cir. 1976). *United States* v. *Rosenberg*, 515 F. 2d 190, 199 (9th Cir. 1975), cert. denied, 423 U.S. 1031 (1976). *United States* v. *Green*, 511 F. 2d 1062, 1066, 1073 (7th Cir. 1975), cert. denied, 423 U.S. 1031 (1976).

United States v. *Badia*, 490 F. 2d 296, 297 (1st Cir. 1973). *United States* v. *Bartee*, 479 F. 2d 484, 489 (10th Cir. 1973).

There was other evidence to support the judge's findings. The defendant permitted Garrison to name the drug he wanted. See *United States* v. *Ellzey*, 527 F. 2d 1306 (6th Cir. 1976). The defendant expressed concern about where the prescriptions would be filled. See *United States* v. *Larson*, 507 F. 2d 385, 387-388 (9th Cir. 1974); *United States* v. *Bartee*, 479 F. 2d 484, 489 (10th Cir. 1973). The issuing of additional prescriptions for percodan at short intervals to Garrison and Phinney could have been found to be inconsistent with accepted medical treatment and support an inference that the prescriptions were not intended to serve a medical purpose. See *United States* v. *Green*, 511 F. 2d 1062, 1066, 1073 (7th Cir. 1975), cert. denied, 423 U.S. 1031 (1976); *United States* v. *Larson*, 507 F. 2d 385, 387-388 (9th Cir. 1974); *United States* v. *Bartee*, *supra*. The defendant's remarks and actions in the course of the officers' visits, which need not be summarized here, also support the conclusion that the prescriptions were not issued for a medical purpose.

3. There was no prejudicial error in any rulings on the admission of evidence.

It was within the judge's discretion to permit an osteopathic physician, who did not treat drug dependent patients, to give his opinion that it was not consistent with accepted medical practice to prescribe the drugs which the defendant prescribed without obtaining some medical history or background and without first conducting a physical examination. See *Commonwealth* v. *Boyd*, Mass. , - (1975).[e] W.B. Leach & P.J. Liacos, Massachusetts Evidence 97 (4th ed. 1967). The physician's opinion concerning proper medical practice in treating drug dependent patients in certain circumstances was

[e]Mass. Adv. Sh. (1975) 687, 703-705.

also admissible. His lack of detailed experience with the treatment of drug dependent patients went to the weight, but not to the admissibility of his testimony.

Admission of evidence from a pharmacist that six of the seven prescriptions of the defendant were "fillable" is no ground for reversal of the convictions. In the absence of any contention by the defendant that the seven prescriptions were not in fact orders for drugs, as they appeared to be on their face, the question whether the prescriptions were in proper form, and hence fillable, was immaterial to the prosecutor's case, as we have interpreted G.L. c. 94C. However, the admission of testimony that certain prescriptions would have been filled by a pharmacist if presented seasonably did not prejudice the defendant in any way.[9]

We find no impropriety in permitting the undercover police officers to testify concerning statements made by the defendant in their presence during the course of the visits to the defendant's office. Some of these statements were made to third persons who were in the doctor's waiting room. Some of the statements were profane; some were trivial; and some indicated that the defendant had young persons in the area of his office with whom he engaged in general discussions of sex and drugs. All these statements were made by the defendant in the presence of the witness. There is, therefore, no valid hearsay objection to the admission of the testimony.

The issue of the relevancy of this evidence is a more substantial one. However, the question whether the defendant was acting in the usual course of his practice and in accord with accepted medical practice was an important issue in the case. In such a situation, the conduct and remarks of the

[9] The defendant raises no objection to the pharmacist's testimony that the prescription for biphetamine T-20 would not have been filled. The witness testified that the Federal Food and Drug Administration had withdrawn this compound from the market.

physician in the patient's presence may be helpful in assessing the physician's good faith or bad faith in prescribing the drugs. Although in a case tried to a jury, some of the defendant's comments might have been so prejudicial as to distract the jury from their proper fact-finding duties, where this case was tried to a judge we see no overriding prejudice which makes the admission of otherwise relevant evidence improper.

There was no error in admitting testimony from one of the police officers that the defendant gave him two prescriptions not the subject of indictments. As we have said the circumstances of the purported physician-patient relationship are relevant to the basic question of the bona fides of the defendant's conduct in prescribing the controlled substances which are the subject of the indictments. Thus, evidence of the circumstances under which other drugs are prescribed at the same time is admissible.

Judgments affirmed.

COMMONWEALTH OF MASSACHUSETTS.

BARNSTABLE, ss.

At the Superior Court begun and holden at Barnstable within and for the County of Barnstable, on the first Monday of April in the year of our Lord one thousand nine hundred and seventy-three

The jurors for the said Commonwealth on their oath present, That Arnold C. Comins on or about the months of March and April in the year of our Lord one thousand nine hundred and seventy-three at diverse times, at Orleans, in the County of Barnstable aforesaid, in bad faith and in excessive amounts, did knowingly or intentionally dispense controlled

substances, Class B, to wit: derivatives of barbituric acid and amphetamines and derivatives of opium.

A TRUE BILL.

PHILIP A. ROLLINS, *District Attorney.*

EDWARD W. OSGOOD, JR., *Foreman of the Grand Jury.*

COMMONWEALTH OF MASSACHUSETTS.

BARNSTABLE, ss.

At the Superior Court begun and holden at Barnstable within and for the County of Barnstable, on the first Monday of April in the year of our Lord one thousand nine hundred and seventy-three

The Jurors for the said Commonwealth on their oath present, That Arnold C. Comins on or about the twenty-seventh day of March in the year of our Lord one thousand nine hundred and seventy-three at Orleans, in the County of Barnstable aforesaid, in bad faith and in excessive amounts did knowingly or intentionally dispense a controlled substance, Class C, to wit: placidyl, in violation of Section 32 of Chapter 94C of the General Laws of this Commonwealth.

A TRUE BILL.

PHILIP A. ROLLINS, *District Attorney.*

EDWARD W. OSGOOD, JR., *Foreman of the Grand Jury.*

Indictment No. 34241.

At the Superior Court begun and holden and Barnstable within and for the County of Barnstable on the first Monday of April in the year of our Lord one thousand nine hundred and seventy-four.

The Jurors for the said Commonwealth on their oath present, That Arnold C. Comins on or about the twenty-seventh day of March in the year of our Lord one thousand nine hundred and seventy-three, at Orleans, in the County of Barnstable aforesaid, did unlawfully dispense a controlled substance, Class B, to wit: Percodan, not for a legitimate medical purpose, in violation of the provisions of Massachusetts General Laws Chapter 94C, Section 32.

A TRUE BILL.

PHILIP A. ROLLINS,
District Attorney.

DAVID F. MATHEWS,
Foreman of the Grand Jury.

Indictment No. 34242.

At the Superior Court begun and holden at Barnstable within and for the County of Barnstable, on the first Monday of April in the year of our Lord one thousand nine hundred and seventy-four.

The Jurors for the said Commonwealth on their oath present, That Arnold C. Comins on or about the thirtieth day of March in the year of our Lord one thousand nine hundred and seventy-three, at Orleans, in the County of Barnstable aforesaid, did unlawfully dispense a controlled substance, Class B,

to wit: Percodan, not for a legitimate medical purpose, in violation of the provisions of Massachusetts General Laws Chapter 94C, Section 32.

A TRUE BILL.

PHILIP A. ROLLINS,
District Attorney.

DAVID F. MATHEWS,
Foreman of the Grand Jury.

Indictment No. 34243.

At the Superior Court begun and holden at Barnstable within and for the County of Barnstable, on the first Monday of April in the year of our Lord one thousand nine hundred and seventy-four.

The Jurors for the said Commonwealth on their oath present, That Arnold C. Comins on or about the third day of April in the year of our Lord one thousand nine hundred and seventy-three, at Orleans, in the County of Barnstable aforesaid did unlawfully dispense a controlled substance, Class B, to wit: Percodan, not for a legitimate medical purpose, in violation of the provisions of Massachusetts General Laws Chapter 94C, Section 32.

A TRUE BILL.

PHILIP A. ROLLINS,
District Attorney.

DAVID F. MATHEWS,
Foreman of the Grand Jury.

Indictment No. 34244.

At the Superior Court begun and holden at Barnstable within and for the County of Barnstable on the first Monday of April in the year of our Lord one thousand nine hundred and seventy-four.

The Jurors for the said Commonwealth on their oath present, That Arnold C. Comins on or about the third day of April in the year of our Lord one thousand nine hundred and seventy-three, at Orleans, in the County of Barnstable aforesaid, did unlawfully dispense a controlled substance, Class B, to wit: Tuinal, not for a legitimate medical purpose, in violation of the provisions of Massachusetts General Laws Chapter 94C, Section 32.

A TRUE BILL.

PHILIP A. ROLLINS,
District Attorney.

DAVID F. MATHEWS,
Foreman of the Grand Jury.

Indictment No. 34245.

At the Superior Court begun and holden at Barnstable within and for the County of Barnstable, on the first Monday of April in the year of our Lord one thousand nine hundred and seventy-four.

The Jurors for the said Commonwealth on their oath present, that Arnold C. Comins on or about the thirtieth day of March in the year of our Lord one thousand nine hundred and seventy-three, at Orleans, in the County of Barnstable aforesaid, did unlawfully dispense a controlled substance, Class B,

to wit: Percodan, not for a legitimate medical purpose, in violation of the provisions of Massachusetts General Laws Chapter 94C, Section 32.

A TRUE BILL.

PHILIP A. ROLLINS,
District Attorney.

DAVID F. MATHEWS,
Foreman of the Grand Jury.

Indictment No. 34246.

At the Superior Court begun and holden at Barnstable within and for the County of Barnstable, on the first Monday of April in the year of our Lord one thousand nine hundred and seventy-four.

The Jurors for the said Commonwealth on their oath present, That Arnold C. Comins on or about the third day of April in the year of our Lord one thousand nine hundred and seventy-three, at Orleans, in the County of Barnstable aforesaid, did unlawfully dispense a controlled substance, Class B, to wit: Percodan, not for a legitimate medical purpose, in violation of the provisions of Massachusetts General Laws Chapter 94C, Section 32.

A TRUE BILL.

PHILIP A. ROLLINS,
District Attorney.

DAVID F. MATHEWS,
Foreman of the Grand Jury.

Indictment No. 34247.

At the Superior Court begun and holden at Barnstable within and for the County of Barnstable, on the first Monday of April in the year of our Lord one thousand nine hundred and seventy-four.

The Jurors for the said Commonwealth on their oath present, That Arnold C. Comins on or about the third day of April in the year of our Lord one thousand nine hundred and seventy-three, at Orleans, in the County of Barnstable aforesaid, did unlawfully dispense a controlled substance, Class B, to wit: Biphetamine T-20, not for a legitimate medical purpose, in violation of the provisions of Massachusetts General Laws Chapter 94C, Section 32.

A TRUE BILL.

PHILIP A. ROLLINS,
District Attorney.

DAVID F. MATHEWS,
Foreman of the Grand Jury.

Nos. 34241-34247.

[Caption omitted in printing.]

Motion to Dismiss Indictments.

Now comes the Defendant in the above-entitled indictments and moves to dismiss said indictments and assigns as grounds therefor the following:

1. That the indictments on their face fail to set out any offense under chapter 94C Section 32.

2. That the indictments in question fail to set out any offense under Chapter 94C.

3. That the indictments in question are vague and ambiguous in contravention of the Defendant's right to be fully and clearly informed of the charge against him pursuant to Article 12 of the Declaration of Rights and the Sixth Amendment to the United States Constitution.

4. That Section 32 of chapter 94C is unconstitutionally vague and ambiguous.

5. That the indictments do not enable the Defendant to understand the charge against him and to prepare his defense, all in violation of chapter 277, Section 34.

6. That the indictments purport to charge the Defendant, a physician, with "dispensing" by virtue of writing prescriptions which clearly does not constitute dispensing under any construction of chapter 94C.

7. That the indictments are defective in that said indictments fail to indicate where and to whom the allegedly controlled substances were dispensed; that the said indictments fail to describe with any specificity what the controlled substances allegedly dispensed were.

8. That to the extent the Government relies on the provisions of chapter 277, Section 38 to cure said defects, Defendant contends that said chapter 277, Section 38 is unconstitutional and violates Defendant's rights both under the Bill of Rights of the United States Constitution and the Declaration of Rights.

9. That the indictments in question purport to allege a violation by the Defendant, a physician, of chapter 94C, Section 32, Defendant maintains that "dispensing" under Section 32 of chapter 94C has no application to the Defendant as a physician.

10. That certain of the indictments on their face are identical and that Defendant believes that with respect to certain of the indictments they are multiplicitous in that they attempt

to prosecute a single transaction by charging it as more than one crime.

By his attorney,
ROBERT W. HARRINGTON.

Filed April 26, 1974, and denied (Travers, J.) November 14, 1974. Defendant's exception noted.

Nos. 34241-34247.

[Caption omitted in printing.]

Further Motion to Dismiss Indictments.

Now comes the Defendant in the above-entitled indictments and moves to dismiss the indictments and assigns as grounds therefor the following:

1. That the indictments were returned by a Grand Jury which heard testimony on Thursday, April 4, 1974; that the testimony before the Grand Jury was improper and prejudicial; that the testimony before the Grand Jury was inadequate upon which to return the indictments in question; that based upon the above, the return of the indictments was improper and a violation of the Defendant's Constitutional Rights.

By his attorney,
ROBERT W. HARRINGTON.

Filed June 13, 1974, and denied (Travers, J.) November 14, 1974. Defendant's exception noted.

Barnstable County Grand Jury Minutes, dated April 4, 1974.

[11] prescriptions. He wrote like for 30 Percodan to be taken one every four to six hours on the 27th. He has to sleep a certain amount. Then, he prescribed also on 3-30, another prescription for another 30 Percodan. No examination.

A JUROR: That's the other point.

THE WITNESS: No examination.

A JUROR: So, point one would be the excessive amount that the person can use and point two, the Doctor must examine someone and find cause to issue this other than the person's requesting it.

THE WITNESS: That's right, because it's not a legal prescription the way it was prescribed under the law. Plus, the evidence that was put in here about what he wanted. He told the Doctor what he wanted and the Doctor gave it to him. It wasn't like the Doctor said, "This is what you should have".

A JUROR: These are all pills?

THE WITNESS: All pills so far, yes.

The Policewoman, on March 30th — this is Policewoman Nancy Phinney, the Policewoman of the Yarmouth Police. At approximately 2:15 p.m. on [12] Friday, March 30, 1973, she went to the office of Doctor Comins and she entered the office, which is located in the basement of his home. There were four people sitting around. One of these four was the Doctor. "He asked me to sit down and join the discussion they were having. There were two girls and a young man, all approximately 20 years old, as well as the Doctor. They were having a discussion about identity in a relationship. We discussed this for a while, and I made the comment that it was hard, if not impossible, to maintain your identity in a relationship that lasted more than a few months. The Doctor said

that a relationship was lasting and successful even if it only lasted for one night, if they fucked. He told the group, 'All a woman really wants to do is fuck and a guy with any brains can get her to'. The whole discussion was about sex.

I told him that my brother, who lived in Albany, was getting married soon and that I was upset about it because I did not feel that he would be happy with his girlfriend for a long period. Doctor Comins asked me if I thought she would take his [13] balls away. I said that I thought she would try to. He said it sounded as if I loved my brother in an incestuous way and that I was probably jealous of his future wife which was perfectly normal. He then asked me if I had ever fucked my brother. I replied, 'No'. He said, 'You should go home now and fuck him'. Then, he told me that when my brother got married, I should live with him and his wife. I said I did not think that was a good idea, that they deserved to have some privacy. He said that was foolish and he asked me what kind of hangups I had. He said that I should move right in with them and teach her how to be a real woman.

The Doctor then began discussing parents and their arbitrary use of power. He said they were the reason that the world was so fucked up today. He asked one of the girls what she thought of her parents and she said that they were really great people who understood her completely. She said that she could tell them anything and they would understand her. The Doctor laughed and said, 'If that is true, then why don't you live with them?' She said that she didn't because they lived in [14] Pennsylvania and she loved Cape Cod. He then said, 'Would they allow you to bring a guy home and fuck him in front of them?' She said, 'Yes, probably'. The Doctor then conceded that they must be understanding.

He asked the young man about his parents, and the man replied that his mother was understanding but his father was very straight. The Doctor then said, 'Your father isn't

straight, he's jealous. If you brought him home some pussy he could fuck, he'd be understanding'. He then turned to me, and I told him I was an orphan."

A JUROR: I wonder if we can do away with the extraneous? I don't want to cut you off. I think we have heard anough of that. It's very interesting. If we could get right to where you want the indictments, so we can take action.

THE WITNESS: Okay.

A JUROR: There is nothing illegal about the language.

THE WITNESS: No.

A JUROR: It sure doesn't represent a common Doctor.

[15] A JUROR: Right. I think we have the idea.

THE WITNESS: The Policewoman said that she was on junk, which is drugs, and would like a prescription for Percodan. He said, "Fine, no problem." He asked her name and age and address and then said, "Cash these scripts in in Boston", and handed the prescriptions to her. He never examined her or asked her any more questions. She left the office at approximately 5:00 p.m.

A JUROR: I have a question in regards to him telling these various so-called patients to get these prescriptions filled in various places. Is that so it would be harder to keep track of what he prescribed?

THE WITNESS: Well, yes. Prior to this, a lot of pharmacists did shut him off. They wouldn't fill his prescriptions because they felt they had an obligation.

A JUROR: He was doing this so it would be harder to trace?

THE WITNESS: Yes, right. I have a prescription here for Percodan tablets, dispense 30, one every six hours as needed for pain for the. . . .

. . . . . .

Supreme Court, U. S.
FILED
MAR 5 1977
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1068.

ARNOLD C. COMINS,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Brief for the Respondent in Opposition.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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In the
Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1068.

ARNOLD C. COMINS,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Brief for the Respondent in Opposition.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS.

Opinion Below.

The opinion of the Supreme Judicial Court is reported in 1976 Mass. Adv. Sh. 2448, 356 N.E. 2d 241, and has been appended to the brief (App. A).

Jurisdiction.

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented.

1. Whether the nature of the testimony heard by the grand jury required the dismissal of the indictments on which petitioner was tried.
2. Whether the petitioner received fair notice of the offense with which he was charged.

Statutory Provisions.

Section 32 (par. 1) of chapter 94C of the General Laws of Massachusetts (App. B).

Section 19(a) of chapter 94C of the General Laws of Massachusetts (App. C).

Statement of the Case.

The petitioner was tried, without jury, on seven indictments returned April 4, 1974. Each of the seven indictments charged that the defendant did unlawfully dispense a certain controlled substance, in violation of Massachusetts General Laws, c. 94C, § 32. The trial judge found petitioner guilty on all seven indictments. He was

sentenced on each of five indictments to two years, suspended, with probation for a term of five years from and after the previous sentence, and on each of two indictments to a fine of $2,500. The Supreme Judicial Court affirmed these convictions and denied rehearing.

The facts in this case are summarized in the opinion of the Supreme Judicial Court. 1976 Mass. Adv. Sh. 2448, 356 N.E. 2d 241. Petitioner misstates several facts which should be corrected. He states that there was evidence that the drugs prescribed were appropriate to the complaints; and that all of the drugs have accepted uses in the treatment of drug-dependent persons. This distorts the testimony of the expert witnesses. In fact, all the testimony about the drugs emphasized their serious contraindications and the caution with which they should be prescribed. Three drugs were involved here: tuinal, percodan, and biphetamine T-20. There was testimony that tuinal was appropriately prescribed for insomnia, when the patient "hasn't played with drugs" (Tr. IiI, 47). Another expert testified that tuinal could conceivably be used with someone who is drug-dependent, but that it would likely be used in a hospital, not in out-patient care (Tr. III, 59-60). As for percodan, there was testimony that it is prescribed for the relief of pain (Tr. III, 11-12), but other testimony that it is not commonly used in the management of patients in opiate detoxification (Tr. III, 59).

The testimony concerning biphetamine T-20 was damaging. One expert testified that it should not be used with drug-dependent people (Tr. III, 61). Another expert testified that biphetamine T-20 had been withdrawn from the market by the Food and Drug Administration in the month prior to the date of the prescription (Tr. II, 57, 58).

Reasons Why the Petition is Opposed.

I. The Supreme Judicial Court Correctly Held that there was No Reason to Dismiss the Indictments.

The Supreme Judicial Court held that, as a matter of Massachusetts law, there was no reason to dismiss the indictments. Under Massachusetts law, an indictment can be based exclusively on hearsay, tips, rumors, evidence offered by the prosecution, or the personal knowledge of the jurors. *Commonwealth* v. *Gibson*, 1975 Mass. Adv. Sh. 2652, 2659-2663, 333 N.E. 2d 400. The nature of the testimony presented to the grand jury does not raise a constitutional question.

The United States Constitution does not require a state to proceed against a defendant by means of a grand jury indictment. *Hurtado* v. *California*, 110 U.S. 516, 538 (1884). This Court has suggested, but not held, that once a state has chosen a grand jury procedure, it must furnish an "unbiased grand jury." *Beck* v. *Washington*, 369 U.S. 541, 546 (1962). Should such a suggestion ever become explicitly a constitutional requirement, it would be based on the due process clause of the Fourteenth Amendment. Thus the grand jury proceedings would be examined to determine whether they "offend[ed] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934).

Examining the entire grand jury proceedings in this case, it is clear that the due process clause of the Fourteenth Amendment was not violated. The testimony which petitioner characterizes as inflammatory and prejudicial concerned his discussions, with patients in his office, of sex.

This was determined by the Supreme Judicial Court to be relevant evidence, when admitted at trial:

> [T]he question whether the defendant was acting in the usual course of his practice and in accord with accepted medical practice was an important issue in the case. In such a situation, the conduct and remarks of the physician in the patient's presence may be helpful in assessing the physician's good faith or bad faith in prescribing the drugs. 1976 Mass. Adv. Sh. at 2462, 356 N.E. 2d at 249.

In light of the whole record, this determination of relevance is correct.

The alleged bias in this case did not arise out of excessive publicity which might have led the jurors to judge the potential defendant before they conducted their investigation. See *Beck* v. *Washington*, *supra*. It did not arise because the grand jury was not constituted legally. See *Pierre* v. *Louisiana*, 306 U.S. 354 (1939). The alleged bias arose, rather, because the grand jury during their investigation heard testimony which inculpated the petitioner. This is precisely what the grand jurors, pledged to indict no one because of prejudice and to free no one because of special favor, are charged to do. Under the reasoning of the petition here, every valid indictment would be suspect because any inculpatory testimony heard by the indicting grand jury could be characterized as prejudicial and inflammatory. This Court's suggestions about the requirement of an unbiased grand jury do not require the kind of scrutiny of indictments suggested in this petition. See *Costello* v. *United States*, 350 U.S. 359 (1956).

Finally, in petitioner's trial on the merits, the court strictly observed all the rules designed to bring about a fair verdict. Whatever harm he may have suffered by reason of the grand jury proceedings was cured.

The Supreme Judicial Court was correct, then, in refusing to find constitutional infirmity in the indictments here. Its decision is in accord with the decisions of this Court.

II. The Petitioner Received Fair Notice of the Crimes with Which he was Charged.

Petitioner argues that the Supreme Judicial Court's construction of the statute under which he was convicted, as applied to him, deprived him of notice that his conduct violated the statute.

This argument has not been properly raised in the state court. Petitioner made this argument, however vaguely, in his petition for rehearing. However, a petition for rehearing is not the proper method, under Massachusetts procedure, for raising issues whose existence can be known only after the appellate court's decision. Rule 27(a) of the Massachusetts Rules of Appellate Procedure allows a petition for rehearing to bring to the appellate court's attention ". . . points of law or fact which it is contended the court has overlooked or misapprehended. . . ." It does not provide for the raising of new issues. Therefore, the argument raised here has not been properly raised in the state courts, and for that reason this Court should decline to review it. Cf. *Beck* v. *Washington*, *supra*, 369 U.S. at 549-554.

Furthermore, the argument is without merit. The plain language of the statute, part of the Controlled Substances

Act, provides clear warning. The Supreme Judicial Court read the statute as it was meant to be read.

Chapter 94C, § 32, provides in part:

> Except as authorized by this chapter, no person shall knowingly or intentionally . . . dispense . . . a controlled substance. . . .

The necessary statutory authorization for persons who practice medicine is found in § 19(a) of the same chapter: "A prescription for a controlled substance to be valid shall be issued for a legitimate medical purpose by a practitioner acting in the usual course of his professional practice. . . ."

The common sense reading of this statutory scheme notifies every person that if the chapter does not authorize his conduct, then he is in violation of § 32. Just as both sections must be read together to determine who is authorized to dispense controlled substances, so too both sections must be read together to determine whether particular conduct is not authorized and therefore in violation of § 32. Further, § 19 provides: "An order purporting to be a prescription issued not in the usual course of professional treatment . . . is not a prescription within the meaning and intent of section one and . . . the person issuing it shall be subject to the penalties provided by section thirty-two." Thus § 19, by its terms, requires that it be read with § 32.[1]

Petitioner was charged in each indictment with unlawfully dispensing, not for a legitimate medical purpose, in

[1] Petitioner's reliance on *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), is misplaced. The petitioner in *Bouie* did not violate the statute as it was written, while in this case petitioner did violate the statute as it is written.

violation of § 32 of chapter 94C.[1] In the bills of particulars, the manner and means of the violations of § 32 were set out: "the defendant did write a prescription in excessive amounts and not for a legitimate medical purpose for a Class B Controlled Substance" (App. E, p. 21a). These clearly set out the nature of the charge against petitioner.

Petitioner suggests that the "tortured construction" of the statutory scheme by the Supreme Judicial Court deprived him of the notice he already had. The court did not add new meaning to, but rather elaborated on, the language of §§ 19 and 32. Federal courts elaborating analogous federal statutes have used similar language. *United States* v. *Rosenberg*, 515 F. 2d 190, 197 (9th Cir. 1975), cert. denied, 423 U.S. 1031 (1975); *United States* v. *Collier*, 478 F. 2d 268, 272 (5th Cir. 1973). In fact, this Court has explained the analogous federal statute in a similar manner. *United States* v. *Moore*, 423 U.S. 122, 138-139, 142-143 (1975).

Petitioner's case is the first one in which c. 94C, § 32, has been applied to a physician. However, physicians who stepped out of bounds have been prosecuted under predecessor narcotics statutes in Massachusetts. In *Commonwealth* v. *Noble*, 230 Mass. 83, 119 N.E. 510 (1918), the defendant was charged and convicted of unlawfully prescribing, when not obviously needed for therapeutic purposes, certain narcotic drugs, to persons known by the defendant to be addicts. The Supreme Judicial Court, in affirming the conviction, explained that the statute reaches a physician acting in bad faith:

[1]The two indictments printed in the petition at 16a and 17a, and discussed in the petition at 3 and 10, are not part of the record of this case. While arguably they might be directed at similar conduct of the petitioner, a nolle prosequi was entered on them; and they are not relevant to this case.

The statute in question was enacted to limit and control further the use of such drugs by prohibiting the giving of prescriptions therefor by unscrupulous practitioners to habitual users of drugs, "except when the drug is obviously needed for therapeutic purposes." The statute (§ 3) at the same time provides for the protection of reputable physicians who act honestly and in good faith.

While the question whether the drug is or is not obviously needed for therapeutic purposes in a given case is a question for the attending physician and he is not to be held liable for a violation of the statute if he acts in good faith, it does not follow that his judgment in the matter is conclusive and cannot be reviewed or inquired into in a prosecution for an alleged violation of the statute. 230 Mass. at 87-88, 119 N.E. at 512.

See also *King* v. *Solomon*, 323 Mass. 326, 329-330, 81 N.E. 2d 838, 840 (1948). Cf. *United States* v. *Behrman*, 258 U.S. 280 (1922).

In 1964 an Opinion of the Attorney General ruled that the Massachusetts narcotics statutes demonstrate a legislative intent to permit the prescribing of narcotics by physicians in good faith and in legitimate practice only. 1964 *Opinion of the Attorney General*, 104-105. In 1972, the Supreme Judicial Court stated, in affirming the conviction of a physician under the immediate predecessor of the Controlled Substances Act: "We recognize that the professional judgments of a physician, exercised in good faith, may impel him to dispense drugs to a patient. . . . Nevertheless, the exercise of the physician's discretion in such matters is not conclusive or beyond question." *Commonwealth* v. *Miller*, 361 Mass. 644, 656, 282 N.E. 2d 394, 402 (1972).

In light of this tradition in Massachusetts, the language of the Supreme Judicial Court in petitioner's case was clear, predictable, and correct. Petitioner's argument of failure of notice must fail.

Conclusion.

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Appendix A.

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

COMMONWEALTH *vs.* ARNOLD C. COMINS

Barnstable. May 4, 1976. — October 18, 1976.

Present: Hennessey, C.J., Braucher, Kaplan, & Wilkins, JJ.

Narcotic Drugs. Physician. Practice, Criminal, Indictment. *Evidence,* Relevancy and materiality; Opinion: expert; Hearsay. *Words,* "Dispense," "Ultimate user."

Indictments found and returned in the Superior Court on April 4, 1974. The cases were heard by *Zarrow,* J. The Supreme Judicial Court granted a request for direct appellate review.

Robert W. Harrington (*Judith E. Diamond* with him) for the defendant.

W. James O'Neill, Assistant District Attorney (*Gary A. Nickerson,* Assistant District Attorney, with him) for the Commonwealth.

WILKINS, J. The defendant, a licensed osteopathic physician, appeals from seven convictions for dispensing controlled substances in violation of G.L. c. 94C, § 32.[1] He challenges (1) the denial of his motions to dismiss each indictment, (2) the denial of his motions for judgments of acquittal, and (3) certain evidentiary rulings made during the course of his

[1] The first paragraph of G.L. c. 94C, § 32, inserted by St. 1971, c. 1071, § 1, provides in part: "Except as authorized by this chapter, no person shall knowingly or intentionally manufacture, distribute, dispense or possess with intent to manufacture, distribute or dispense a controlled substance. . . ."

jury waived trial. This case is concerned principally with the proper form of an indictment which charges a prescribing physician with violation of the controlled substances act (G.L. c. 94C) and with the proof necessary to sustain a conviction of a physician for the unlawful prescribing of a controlled substance. We granted the defendant's application for direct appellate review. We affirm the convictions.

1. The defendant moved to dismiss the indictments, relying on several grounds.[1] Of those grounds which the defendant still pursues, some may be disposed of briefly.

The fact that the indictments were issued solely on the basis of hearsay evidence is not in itself a ground for their dismissal. *Commonwealth* v. *Gibson*, Mass. , - (1975).[a] *Commonwealth* v. *Lammi*, 310 Mass. 159, 163-164 (1941). *Costello* v. *United States*, 350 U.S. 359 (1956). See *Commonwealth* v. *Lincoln*, Mass. , n. 2 (1975),[b] for a discussion of a preferred procedure. These authorities indicate that, in the absence of extraordinary circumstances, an indictment based exclusively on hearsay will not be overturned. There are no extraordinary circumstances shown in the grand jury proceedings.

The indictments did not have to allege in the words of § 32 that the defendant "knowingly or intentionally" dispensed a controlled substance unlawfully. Although a knowing or intentional delivery is clearly an element of the crimes charged, as § 32 states, the form of these indictments was

[1] Each indictment followed the same form, charging that the defendant on a certain day in March or April, 1973, at Orleans, "did unlawfully dispense a controlled substance, Class B, to wit: [naming the drug], not for a legitimate medical purpose, in violation of [G.L. c. 94C, § 32]."

[a] Mass. Adv. Sh. (1975) 2652, 2659-2663.

[b] Mass. Adv. Sh. (1975) 2215, 2222 n. 2.

proper by reason of G.L. c. 277, § 38, as appearing in St. 1971, c. 1071, § 8, which states that "[i]n a prosecution under any provision of [G.L. c. 94C], for unlawfully . . . dispensing . . . a controlled substance . . . it shall be sufficient to allege that the defendant did unlawfully . . . dispense . . . such alleged substance, without any further allegations . . . but the defendant shall be entitled to a bill of particulars under [§ 40]." This language, adopted as part of the same act which inserted G.L. c. 94C, answers any claim that the indictment had to allege that the defendant acted "knowingly or intentionally." See *Commonwealth* v. *Baker*, Mass. , - , (1975);[c] *Commonwealth* v. *McClaine*, Mass. , - (1975),[d] and cases cited. Here, there is no question that the defendant had sufficient notice of the nature of the charges against him. The indictments stated that his conduct was "not for a legitimate medical purpose, in violation of [G.L. c. 94C, § 32]," and the defendant's motions for particulars were allowed and bills of particulars were filed to which the defendant has raised no objection.

We come then to the defendant's major challenge to the indictments. He contends that a registered physician cannot be guilty of "dispensing" a controlled substance in violation of G.L. c. 94C, § 32. He argues that a licensed physician cannot "dispense" a controlled substance in violation of G.L. c. 94C because only when the delivery of a controlled substance is a lawful delivery can one "dispense" that substance as the word "dispense" is defined in G.L. c. 94C, § 1, as amended by St. 1972, c. 806, § 3. Consequently, so the argument goes, no unlawful "dispensing" by a physician may occur under G.L. c. 94C. The inference is that a physician may be charged under G.L. c. 94C, § 32, with unlawful

[c] Mass. Adv. Sh. (1975) 1875, 1899-1900, 1902.

[d] Mass. Adv. Sh. (1975) 1266, 1267-1268.

"distributing" of a controlled substance but not with "dispensing."[3]

The premise of the defendant's argument fails on a literal reading of the definition of "dispense." If "dispensing" only can be a lawful act under G.L. c. 94C, it is difficult to explain why the word appears in § 32 to describe unlawful conduct.

A physician who unlawfully issues a prescription for a controlled substance may "dispense" a controlled substance. "Dispense" means "to deliver a controlled substance to an ultimate user or research subject . . . by a practitioner . . . including the prescribing and administering of a controlled substance. . . ." G.L. c. 94C, § 1, as amended by St. 1972, c. 806, § 3. There is nothing in this definition which indicates that the controlled substance or the prescription must be delivered lawfully. The definition of "practitioner" includes a physician even when he is acting outside of his lawfully authorized role. G.L. c. 94C, § 1, inserted by St. 1971, c. 1071, § 1.[4]

The question whether a licensed physician who has delivered a controlled substance unlawfully under the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801 et seq. (1970), should be charged with "dispensing" or with "distributing" that substance has attracted divergent views in the United States Courts of Appeals.[5]

[3] "Distribute" is defined in G.L. c. 94C, § 1, as "to deliver other than by administering or dispensing a controlled substance."

[4] The defendant, even if acting unlawfully, was nevertheless still "[a] physician . . . registered to distribute [or] dispense . . . a controlled substance in the course of professional practice . . . in the Commonwealth."

[5] An initial disagreement among the circuits as to whether a physician may be charged under 21 U.S.C. § 841(a)(1) (1970) with unlawful delivery of a controlled substance was resolved in the affirmative in *United States* v. *Moore*, 423 U.S. 122 (1975). However, because the defendant in the *Moore* case was charged both with "distributing" and "dispensing" (id. at 124), and no question was raised concerning this aspect of the indictment, the *Moore* opinion does not resolve the split among the circuits concerning the proper verb ("dispense" or "distribute") to describe a physician's unlawful prescribing under 21 U.S.C. § 841(a)(1) (1970). The Uniform Controlled Substance Act avoids the problem by referring to "deliver[y]" of a controlled substance (see § 401[a]), a word which the Commissioners' Note to § 401 indicates was selected to include both dispensing and distributing, as defined in the uniform act. Uniform Controlled Substances Act § 401, Note.

Some courts have indicated that a physician is "dispensing" when he prescribes a controlled substance outside of the lawful scope of his practice. See *United States* v. *Hicks*, 529 F. 2d 841, 844 (5th Cir. 1976); *United States* v. *Green*, 511 F. 2d 1062, 1072 (7th Cir. 1975), cert. denied, 423 U.S. 1031 (1976); *United States* v. *Leigh*, 487 F. 2d 206, 207-208 (5th Cir. 1973); *United States* v. *Bartee*, 479 F. 2d 484, 486-488 (10th Cir. 1973). Other courts have indicated that a physician does not "dispense" a controlled substance in such a circumstance; he "distributes" it. See *United States* v. *Ellzey*, 527 F. 2d 1306, 1308 (6th Cir. 1976); *United States* v. *Rosenberg*, 515 F. 2d 190, 200 (9th Cir. 1975), cert. denied, 423 U.S. 1031 (1976); *United States* v. *Black*, 512 F. 2d 864, 866 (9th Cir. 1975); *United States* v. *Badia*, 490 F. 2d 296, 298 (1st Cir. 1973).[6]

We do not face, and need not decide, the issue which has divided the Courts of Appeals. A 1972 amendment of the definition of "dispense" in G.L. c. 94C, § 1, has undercut the reasoning lying behind those Federal opinions which have held that a physician "distributes" but does not "dispense" a controlled substance when he exceeds his professional authorization. Prior to its amendment in 1972, G.L. c. 94C, § 1, defined "dispense" in much the same language as "dispense" is defined in the Federal law. Compare G.L. c. 94C, § 1,

[6] Much can be said for the approach of the uniform act which replaces "distribute" and "dispense" with the single verb "deliver." In these circumstances, the choice of words should not be permitted to become crucial, and judicial time can be better spent trying to resolve more important questions.

inserted by St. 1971, c. 1071, § 1, with 21 U.S.C. § 802 (1970). In the original Massachusetts law, and still under the Federal law, the definition of "dispense" includes the delivery of a controlled substance "pursuant to the *lawful* order of a practitioner" (emphasis supplied). See St. 1971, c. 1071, § 1. The 1972 amendment of the Massachusetts definition eliminated the word "lawful" so that delivery of a controlled substance pursuant to an unlawful order of a physician could constitute "dispensing." St. 1972, c. 806, § 3. The absence of the word "lawful" in the Massachusetts definition of dispense makes the reasoning of the First Circuit Court of Appeals in the *Badia* case seem inapplicable under the present Massachusetts law.[7] The elimination of the word "lawful" with respect to a physician's order when another person acts pursuant to that order gives substantial support to our view that a literal reading of the definition of "dispense" is the correct one: that a physician, "dispenses" whether lawfully or unlawfully.[8]

2. We turn next to the defendant's argument that the evidence did not warrant a conviction under any of the indictments and that, consequently, each motion for judgment of acquittal should have been allowed.

The judge would have been warranted in finding that, on March 27, 1973, one Garrison, a State police officer assigned

[7] All the other opinions of Courts of Appeals cited above (except perhaps the *Black* case, *supra* at 866) which reach the *Badia* result contain no significant analysis of the question and rely on the *Badia* opinion.

[8] A contrary view would mean that an unlawful prescription would require a charge of "dispensing" for one purpose (in a charge against one who distributes a controlled substance pursuant to the prescription) and not for another (in a charge against that physician for acting outside his professional authorization in issuing the prescription). Such legal technicalities should be avoided where possible, and the Legislature has done so in its treatment of the definition of "dispense."

to the Criminal Information Bureau, Narcotics Unit, went to the defendant's office, which was located on the ground floor of his home in Orleans. The defendant was conversing with several adolescents in the reception area. Posing as a patient, Garrison stated that he wished to discuss a personal matter with the defendant. They went into an adjoining consultation room where Garrison told the defendant that he had a drug problem of which he wanted to be free. The defendant asked Garrison whether he used "scag," a street name for heroin, and Garrison replied that he "shot up a couple of bags every two or three days." The defendant then noted that Garrison had taken an important step and asked what he wanted. Garrison replied that he wanted something to help him over the "hard times." The defendant then asked which drug he wanted. Garrison made a request for numorphan, which the defendant refused "because a pharmacist would report a prescription for that to the police. . . ." Garrison rejected the defendant's offer of robitussin and countered with a request for percodan, to which the defendant acceded. They then returned to the reception area where the defendant wrote out a prescription for percodan and another prescription not the subject of an indictment here. When he gave the prescriptions to Garrison, the defendant stated, "I have to write the Percodan 4 to 6 hours per day for pain, but you know how to use it," and suggested that he fill the prescriptions in Hyannis instead of Provincetown. No medical history was taken by the defendant, and he made no physical examination of Garrison. Garrison did not see the usual items associated with a medical practice when he was in the defendant's office.

On March 30, 1973, a female police officer, Phinney, also posing as a patient, went to the defendant's office and found the defendant engaged in a nonmedical discussion with three adolescents, which lasted over an hour. During this time, Garrison returned to the defendant's office, and the defendant

issued another prescription for percodan to him. Garrison had spoken with the defendant by telephone earlier that day, and the defendant had agreed to have Garrison return for a second prescription. In the course of sitting in the defendant's office, Phinney observed the doctor issuing a prescription for a controlled substance to each of the two adolescent girls who were present. One girl was able to get a prescription for percodan when she said she was on "junk." Phinney then stated that she was on "junk," and the defendant wrote a prescription for percodan for her. He asked her to fill the prescription in Boston. At no time on March 30 did the defendant either take a medical history or conduct a physical examination of either Garrison or Phinney.

On April 3, 1973, Garrison went to the defendant's office again. Phinney arrived shortly thereafter. Phinney requested another prescription of percodan, telling the defendant that the prescription he had given her on March thirtieth had been used up. When the defendant asked her if she wanted anything else, she said she wanted some "T-20's," a reference to biphetamine T-20, a substance which at the time should not have been made available by a pharmacist. A short conversation ensued between Garrison, Phinney, and the defendant as to whether T-20's were "good to get off on," after which the defendant issued Phinney a prescription for percodan and one for biphetamine T-20. When Phinney left, Garrison asked the defendant for another prescription for percodan and for something to help him sleep, and the defendant gave him another prescription for percodan and a prescription for tuinal. The defendant requested that he fill these prescriptions off the Cape. At no time on April 3 did the defendant take a medical history or physically examine either police officer.

At each office visit, each officer paid the defendant $10. The prescriptions were never filled. Percodan, biphetamine

T-20, and tuinal are all controlled substances under G.L. c. 94C. There was expert medical testimony that proper medical practice required a medical history and physical examination before prescribing these drugs for any medical purpose.

We reject as without merit the defendant's argument that the Commonwealth's proof was insufficient because the various prescriptions were not filled. The definition of "dispense" appearing in G.L. c. 94C, § 1, includes "prescribing" within the act of dispensing. The words "including the prescribing and administering of a controlled substance" appearing in the definition of "dispense" mean that either "prescribing" or "administering" are intended to be acts of dispensing. See *United States* v. *Leigh*, 487 F. 2d 206, 208 (5th Cir. 1973). A disjunctive reading of the word "and" is called for in the context. See *United States* v. *Bartee*, 479 F. 2d 484, 487 (10th Cir. 1973), where a similar conclusion was reached as to parallel language in 21 U.S.C. § 802(10) (1970).

The defendant continues, arguing that the delivery must be to "an ultimate user or research subject" (G.L. c. 94C, § 1) in order to constitute a dispensing of a controlled substance and contends that the police officers were neither. An "ultimate user" is defined in G.L. c. 94C, § 1, inserted by St. 1971, c. 1071, § 1, as "a person who lawfully possesses a controlled substance for his own use. . . ." The defendant argues that the undercover police officers did not "possess" a controlled substance "lawfully" and "for [their] own use." As we have already indicated, the prescribing itself constitutes a delivery of a controlled substance within the definition of the word "dispense." There is thus "possession" of a controlled substance without the necessity of going through the needless expense of filling the prescription. Cf. *United States* v. *Green*, 511 F. 2d 1062, 1072 (7th Cir. 1975), cert. denied, 423 U.S. 1031 (1976). We think also that the possession was

"lawful." Police officers acting undercover received the prescriptions in pursuit of their work, and, therefore, their possession was lawful, even if the physician was not acting lawfully in delivering those prescriptions. By the same token, the prescriptions were received for the police officers' own use, in the sense that they received them while acting in the role of a consumer, the purpose of the words "for his own use" in the definition of an "ultimate user" in G.L. c. 94C, § 1.

If undercover police operations such as were conducted here could not lead to convictions under G.L. c. 94C because the police officers were not "ultimate user[s]," the investigation and prosecution of drug violators would be limited severely and unnecessarily. We do not attribute to the Legislature an intention to prohibit undercover police operations of the type involved in this case. The defendant's argument in effect requires us to do so, and we reject it. See *Commonwealth* v. *Miller*, 361 Mass. 644, 655 (1972); *United States* v. *Bartee*, *supra* at 487, where a contention that the drug must be used was rejected under the parallel definition of an "ultimate user" in the Federal act.

We come then to the defendant's argument that the evidence of the circumstances in which the defendant delivered the prescriptions was insufficient to warrant a conviction of a physician for unlawful dispensing of a controlled substance. This argument requires us to analyze the standard to which a physician is held under G.L. c. 94C when he dispenses a controlled substance.

Section 32 of G.L. c. 94C provides in part that "[e]xcept as authorized by this chapter, no person shall knowingly or intentionally . . . dispense . . . a controlled substance. . . ." Clearly a statutory exception is necessary for persons who practice medicine, and for other professionals who make legitimate uses of drugs. For that reason, G.L. c. 94C, § 19(a), inserted by St. 1971, c. 1071, § 1, stated (in part) that

"[a] prescription for a controlled substance to be valid shall be issued for a legitimate medical purpose by a practitioner acting in the usual course of his professional practice."

A physician who issues a prescription not intending to treat a patient's condition in the usual course of his practice of medicine does not issue a valid prescription, and he thus violates § 32. Such a physician violates § 32 because he acts in bad faith, in the sense that his purpose is not to treat the patient in accord with accepted medical practice. Although the physician's failure to comply with accepted medical practice is an element of the crime and evidence is admissible that the physician failed to adhere to accepted medical practice, mere malpractice in the prescribing of drugs has not been made a crime. To prove the crime, the physician's purpose, his state of mind, must be shown to have been such that he was not intending to achieve a legitimate medical objective. *United States* v. *Rosenberg*, 515 F. 2d 190, 193, 194-195 (9th Cir. 1975), cert. denied, 423 U.S. 1031 (1976). *United States* v. *Collier*, 478 F. 2d 268, 272 (5th Cir. 1973). Cf. *United States* v. *Moore*, 423 U.S. 122, 138-139, 142-143 (1975).

We have no question that the evidence summarized above warranted a finding that the defendant acted in bad faith in delivering the prescriptions which are the subject of the indictments in this case. Also, there was evidence that the defendant's conduct was not in accord with accepted medical practice. He took no medical histories and conducted no physical examinations. These facts support an inference that the defendant did not have medical needs in mind when he issued the prescriptions and that he was not interested in finding physical indications of such needs. *United States* v. *Ellzey*, 527 F. 2d 1306 (6th Cir. 1976). *United States* v. *Rosenberg*, 515 F. 2d 190, 199 (9th Cir. 1975), cert. denied, 423 U.S. 1031 (1976). *United States* v. *Green*, 511 F. 2d 1062, 1066, 1073 (7th Cir. 1975), cert. denied, 423 U.S. 1031 (1976).

United States v. *Badia*, 490 F. 2d 296, 297 (1st Cir. 1973). *United States* v. *Bartee*, 479 F. 2d 484, 489 (10th Cir. 1973).

There was other evidence to support the judge's findings. The defendant permitted Garrison to name the drug he wanted. See *United States* v. *Ellzey*, 527 F. 2d 1306 (6th Cir. 1976). The defendant expressed concern about where the prescriptions would be filled. See *United States* v. *Larson*, 507 F. 2d 385, 387-388 (9th Cir. 1974); *United States* v. *Bartee*, 479 F. 2d 484, 489 (10th Cir. 1973). The issuing of additional prescriptions for percodan at short intervals to Garrison and Phinney could have been found to be inconsistent with accepted medical treatment and support an inference that the prescriptions were not intended to serve a medical purpose. See *United States* v. *Green*, 511 F. 2d 1062, 1066, 1073 (7th Cir. 1975), cert. denied, 423 U.S. 1031 (1976); *United States* v. *Larson*, 507 F. 2d 385, 387-388 (9th Cir. 1974); *United States* v. *Bartee*, *supra*. The defendant's remarks and actions in the course of the officers' visits, which need not be summarized here, also support the conclusion that the prescriptions were not issued for a medical purpose.

3. There was no prejudicial error in any rulings on the admission of evidence.

It was within the judge's discretion to permit an osteopathic physician, who did not treat drug dependent patients, to give his opinion that it was not consistent with accepted medical practice to prescribe the drugs which the defendant prescribed without obtaining some medical history or background and without first conducting a physical examination. See *Commonwealth* v. *Boyd*, Mass. , - (1975).[e] W.B. Leach & P.J. Liacos, Massachusetts Evidence 97 (4th ed. 1967). The physician's opinion concerning proper medical practice in treating drug dependent patients in certain circumstances was

[e] Mass. Adv. Sh. (1975) 687, 703-705.

also admissible. His lack of detailed experience with the treatment of drug dependent patients went to the weight, but not to the admissibility of his testimony.

Admission of evidence from a pharmacist that six of the seven prescriptions of the defendant were "fillable" is no ground for reversal of the convictions. In the absence of any contention by the defendant that the seven prescriptions were not in fact orders for drugs, as they appeared to be on their face, the question whether the prescriptions were in proper form, and hence fillable, was immaterial to the prosecutor's case, as we have interpreted G.L. c. 94C. However, the admission of testimony that certain prescriptions would have been filled by a pharmacist if presented seasonably did not prejudice the defendant in any way.[9]

We find no impropriety in permitting the undercover police officers to testify concerning statements made by the defendant in their presence during the course of the visits to the defendant's office. Some of these statements were made to third persons who were in the doctor's waiting room. Some of the statements were profane; some were trivial; and some indicated that the defendant had young persons in the area of his office with whom he engaged in general discussions of sex and drugs. All these statements were made by the defendant in the presence of the witness. There is, therefore, no valid hearsay objection to the admission of the testimony.

The issue of the relevancy of this evidence is a more substantial one. However, the question whether the defendant was acting in the usual course of his practice and in accord with accepted medical practice was an important issue in the case. In such a situation, the conduct and remarks of the

[9] The defendant raises no objection to the pharmacist's testimony that the prescription for biphetamine T-20 would not have been filled. The witness testified that the Federal Food and Drug Administration had withdrawn this compound from the market.

physician in the patient's presence may be helpful in assessing the physician's good faith or bad faith in prescribing the drugs. Although in a case tried to a jury, some of the defendant's comments might have been so prejudicial as to distract the jury from their proper fact-finding duties, where this case was tried to a judge we see no overriding prejudice which makes the admission of otherwise relevant evidence improper.

There was no error in admitting testimony from one of the police officers that the defendant gave him two prescriptions not the subject of indictments. As we have said the circumstances of the purported physician-patient relationship are relevant to the basic question of the bona fides of the defendant's conduct in prescribing the controlled substances which are the subject of the indictments. Thus, evidence of the circumstances under which other drugs are prescribed at the same time is admissible.

Judgments affirmed.

Appendix B.

GENERAL LAWS, CHAPTER 94C, SECTION 19.

[*Authorized Purposes for Which Prescriptions May Be Issued.*]

(*a*) A prescription for a controlled substance to be valid shall be issued for a legitimate medical purpose by a practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances shall be upon the prescribing practitioner, but a corresponding responsibility shall rest with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section one and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided by section thirty-two.

(*b*) No prescription shall be issued in order for a practitioner to obtain controlled substances for supplying the practitioner for the purpose of general dispensing to patients.

(*c*) Unless permitted by federal law, a prescription shall not be issued for the dispensing of drugs or controlled substances as defined in section thirty-eight of chapter one hundred and twenty-three, listed in any schedule to a drug dependent person for the purpose of continuing his dependence upon such drugs, in the course of conducting an authorized clinical investigation pursuant to an addict rehabilitation program.

Appendix C.

GENERAL LAWS, CHAPTER 94C, SECTION 32.

[*Unauthorized Manufacture, Distribution, etc., Prohibited; Penalties.*]

Except as authorized by this chapter, no person shall knowingly or intentionally manufacture, distribute, dispense, or possess with intent to manufacture, distribute or dispense a controlled substance; or create, distribute, dispense or possess with intent to distribute or dispense a counterfeit substance.

Whoever violates any provision of this section relative to a controlled substance in Class A or B of section thirty-one shall be punished by imprisonment in the state prison for not more than ten years or in a jail or house of correction for not more than two and one half years or by a fine of not more than twenty thousand dollars, or both such fine and imprisonment. Whoever violates any provision of this section after one or more prior convictions of a felony under any provision of this chapter, or under a corresponding provision of prior law relating to the sale or manufacture of a narcotic drug as defined in said earlier law, shall be punished by imprisonment in the state prison for not less than five years and not more than fifteen years and by a fine of not more than thirty thousand dollars; except that if a person has a prior conviction of any offense involving the manufacture, distribution, or dispensing of heroin or the possession with intent to manufactuer, distribute or dispense heroin, such person shall be punished by imprisonment in the state prison for not less than ten years nor more than twenty-five years and by a fine of not more than thirty thousand dollars.

Whoever violates any provision of this section relative to a controlled substance in Class C of section thirty-one shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one half years, or by a fine of not more than ten thousand dollars, or by both such fine and imprisonment. Whoever violates any provision of this section after one or more prior convictions of a felony under any provision of this chapter, or under a corresponding provision of prior law relating to the sale or manufacture of a narcotic drug as defined in said earlier law, shall be punished by imprisonment in the state prison for not less than three years nor more than ten years and by a fine of not more than twenty thousand dollars.

Whoever violates any provision of this section relative to controlled substances in Class D of section thirty-one, shall be punished by imprisonment in a house of correction for not more than two years or by a fine of not more than five thousand dollars, or both. Whoever violates any provision of this paragraph after one or more prior convictions of an offense under any provision of this section, or of a felony under any provision of this chapter, or under a provision of prior law relative to the sale or manufacture of a narcotic drug or a harmful drug as defined in said earlier law shall be punished by imprisonment in the state prison for not less than two years nor more than five years and by a fine of not more than ten thousand dollars.

Whoever violates any provision of this section relative to Schedule E of section thirty-one, shall be punished by imprisonment for not more than one year or by a fine of not more than twenty-five hundred dollars, or both. Whoever violates any provision of this paragraph after one or more prior convictions of an offense under any provision of this section, or of a felony under any provision of this

chapter, or under a provision of prior law relative to the sale or manufacture of a narcotic drug or a harmful drug as defined in said earlier law, shall be punished by imprisonment for not less than one year nor more than two years and by a fine of not more than five thousand dollars.

Appendix D.

MASSACHUSETTS RULES OF APPELLATE PROCEDURE.

Appellate Rule 27.

PETITION FOR REHEARING.

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing should be filed with the clerk of the appellate court within ten days after the date of the rescript unless the time is shortened or enlarged by order. It shall state with particularity the points of law or fact which it is contended the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of a petition will not be permitted, except by order of the court. No answer to a petition for rehearing will be received unless requested by the appellate court but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the appellate court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case. Action upon a petition is wholly in the discretion of the full court; and the court may award costs, including a reasonable attorney's fee, to the prevailing party.

(b) Form of Petition; Length. The petition shall be in a form of a letter to the chief justice of the Appellate Court with seven clear and legible copies, and additional copies shall be mailed by first class mail or delivered to all other counsel. Except by permission of the court, a petition

for rehearing shall not exceed ten pages of standard typewritten material.

(c) **Revision of Decision.** Upon consideration of a petition for rehearing, a majority of the justices of the appellate court may in writing order a decision of the court (or a panel thereof) to be reviewed and revised by a majority of the justices of the court.

Appendix E.

[In its brief in the Supreme Judicial Court, the Commonwealth appended the following Bill of Particulars. This Bill of Particulars relates to only one of the indictments; but the other Bills of Particulars, relating to the other indictments, are similar in their descriptions of the manner in which the alleged offenses were committed.]

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS SUPERIOR COURT
No. 34242

COMMONWEALTH
VS
ARNOLD COMINS

Commonwealth's Bill of Particulars

Now comes the Commonwealth in the above entitled matter and states for the Commonwealth:

(1) March 30, 1973

(2) Between 2 and 5 p.m.

(3) Cellar of a dwelling house located at Kescayogansett Road in East Orleans, occupied at the time by Arnold C. Comins.

(4) That the defendant did write a prescription in excessive amounts and not for a legitimate medical purpose for a Class B Controlled Substance.

(5) See #4

(7) The offense took place at what appeared to be the defendant's professional office.

(8) Percodan

(9) Tooper Roland L. Garrison, Massachusetts State Police, 1010 Commonwealth Avenue, Boston, using alias of John L. Arruda.

(10) A prescription was issued on March 30, 1973.

(11) Yes

(13) Prescriptions for Percodan were signed and issued by the defendant for the use of the Commonwealth's agent.

(14) The prescription was for 30 tablets of Percodan.

(15) Said prescriptions were turned over to Cpl. Edmund Souza, Barnstable District Attorney's office to hold as evidence.

(16) See # 14

(17) The prescriptions have not been filled at any pharmacy to date.

For the Commonwealth:

W. JAMES O'NEILL,
Assistant District Attorney.